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United States Supreme Court

October Term, 1904.

Office Supreme Court U. S.
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NUMBER 49.

JOHN F. HILL,

Plaintiff in Error,

vs.

WARREN E. McCORD,

Defendant in Error.

Brief for Defendant in Error.

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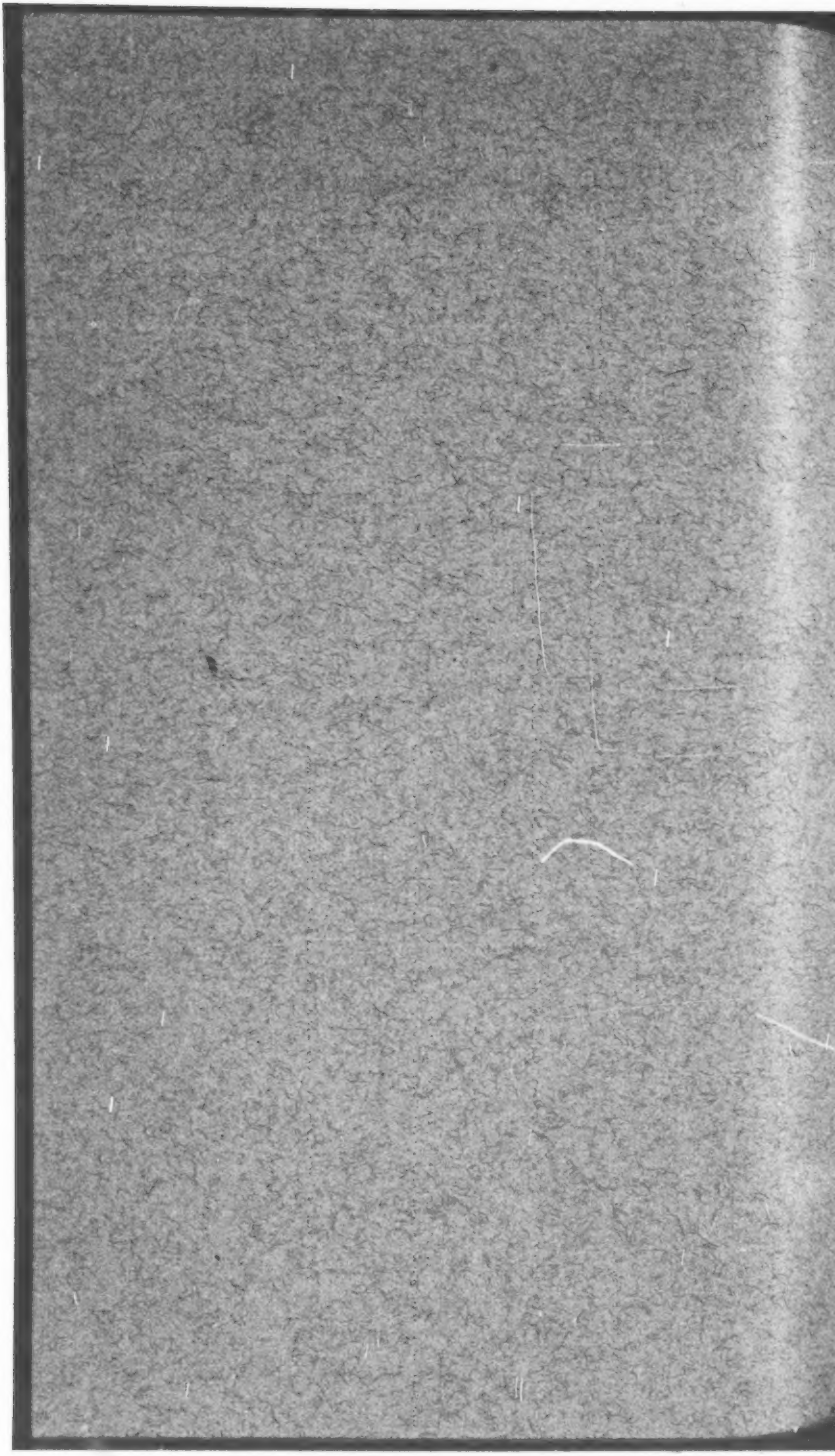

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

It appears from the findings of fact made by the trial court in this action that one Philip W. Jacobus settled upon the land in controversy on the 28th day of January, 1891, and established his residence upon such land on the 4th day of February, of such year. The land was not open for settlement until February 23rd, 1891, and on that date the said Jacobus presented to the land office at Ashland, Wisconsin, an application for a homestead entry. At the same date the Plaintiff in Error filed a soldier's declaratory statement for the same land, and upon the contest which was heard by the land office, Mr. Hill's declaratory statement was cancelled and Jacobus awarded a right of entry to the land on July 6th, 1892. Rec. page 227. On September 20, 1892, Jacobus applied to the land office to commute the homestead entry to a cash entry; this was allowed and Jacobus paid $400 for such land, receiving a certificate therefor. Record, page 228. On December 27, 1892, Jacobus conveyed the land to the plaintiff

in error and one Daniel McLeod, giving a warranty deed to them in consideration of the sum of $4,150. Neither McCord nor McLeod had any interest in the land prior to such conveyance and had no negotiation with Jacobus before he had commuted his homestead entry. Record, page 229. While the plaintiff in error and McLeod were negotiating with Jacobus for the land, they inquired of the defendant in error as to his claim, and as to the title of Jacobus, and the defendant in error stated to them that he had been fairly beaten in his contest, and had no claim upon the land, and if they purchased it he would make no claim to it. Record, p. 229. He further called their attention to Jacobus' claim, recommended his title and advised them to buy it. (Rec. 239.) The commutation by Jacobus had been allowed by the local land office in ignorance of the requirements of the act of March 3rd, 1891, which required fourteen months residence and occupation before commutation should be made. On May 15, 1893, the assistant commissioner of the land office sent a letter to the register of the local land office requiring Jacobus to furnish supplemental proofs showing a residence upon the land for fourteen months subsequent to July 6, 1892, which was assumed as the date of the entry. As Jacobus had sold the land he was unable to comply with this requirement, but in attempting to do so he obtained from the plaintiff in error and McLeod a deed to such land and executed to them a mortgage in return. He then filed certain supplementary proofs, which showed the conveyance and the re-conveyance and the residence upon the land from the 20th day of February, 1893, to the time of the filing of the affidavits. The plaintiff in error filed a protest against such proofs and affidavits of contest, alleging sale and abandonment of the land and attacking the entry and residence of Jacobus. After a hearing upon such contest, the register of the land office decided that the residence of Jacobus upon the land was fairly satisfactory until the sale of the land in December, 1892, but that the subsequent residence was for the sole purpose of enabling him to secure title for his transferees. Record, pp. 230-231. An appeal was taken by Jacobus to the Commissioner and the opinion of the register was affirmed, upon the ground that he re-conveyance was simply for the purpose of making proofs for the benefit of McCord and McLeod. Upon

an appeal to the Secretary of the Interior, the decision of the Commissioner was affirmed without re-stating the facts. Record, p. 231. Thereafter, an Act of Congress approved June 3rd, 1896, provided for the relief of cases where the commutation of the homestead entry had been made in ignorance of the requirement of fourteen months settlement by the act of 1891. Believing himself to be within this act, Jacobus made a motion before the Secretary for review of his decision and also to confirm his entry under the act of 1896. On August 4th, 1896, the Secretary treating the offer to file supplementary proofs as an application for equitable relief to re-enter the lands for the benefit of another, rendered his opinion to the effect that the entry was not made in good faith and that proofs were fraudulent, so that the review could not be had and for the same reason the entry could not be confirmed under the act of 1896. Record, pp. 231-232. Thereafter, the defendant Hill received a preference right of entry and was allowed to re-enter the land September 7, 1896, receiving a patent therefor on January 12, 1897. Record, p. 232. In October, 1896, Jacobus conveyed all his interest in the land to McCord and McLeod, and thereafter McLeod conveyed all his interest to McCord, the plaintiff in error. Record, p. 232.

The action was brought by the plaintiff, McCord, seeking to hold the defendant as trustee for the land under the claim that upon the facts as found by the Secretary of the Interior, Jacobus was within the act of 1896, but that the Secretary refused to confirm his entry under that act because of a mistake of law. This mistake of law was alleged to consist in the holding that the fraud of which Jacobus was found to be guilty, was sufficient to exclude him from the benefits of the act of 1896. The complaint set out the various opinions and documents in the case at length, so that the main facts were presented to the court for determination. Record, pp. 37-53. A general demurrer was interposed by the defendant. Record, p. 54. The demurrer having been sustained in the lower court, an appeal was taken to the supreme court of Wisconsin, and after argument, the decision of the lower court was reversed. The opinion of the supreme court is found in the record, pp. 11-26. It was held by that court, that the fraud found by the Department of the Interior to

exist in the proofs submitted by Jacobus, was in his conveyance of the land to McCord and McLeod and his attempting settlement upon the land after the re-conveyance to him. This, the supreme court held as a matter of law, was not sufficient to deprive Jacobus of the benefits of the act of 1896, and the complaint was considered to otherwise show that Jacobus was within this act. Upon motion, the supreme court ordered re-argument upon certain questions. Record, p. 27. The opinion of the court upon this re-argument is found in the record, pp. 28-33, and the complaint was sustained upon the points argued.

The defendant thereupon answered, setting out at length the testimony upon the contest before the register of the Ashland Land Office. Record, pp. 54-225. The case was tried in the lower court and judgment entered for the plaintiff. Upon appeal, the judgment of the lower court was affirmed. In the opinion of the court it was stated that the complaint had been substantially proved and that it was shown as alleged that the Secretary of the Interior had refused to confirm the entry under the act of 1896, because of what he considered the fraud of Jacobus in attempting settlement after the re-conveyance of the land to him. As a further ground for decision, the supreme court held that Hill was estopped because of his representations to McCord and McLeod in December, 1892. Record, pp. 227-303. From such judgment of the supreme court of Wisconsin this writ of error is taken to this court.

Counsel for the Plaintiff in Error have argued substantially the following propositions:

1. That Philip W. Jacobus, the grantor of the Defendant in Error, was not within the construction of the Act of June 3rd, 1896.

2. That Mr. Jacobus' entry was canceled and the land re-entered by Mr. Hill, prior to the passage of the Law of June 3rd, 1896.

3. That the proper construction of the opinion of the Secretary of the Interior, of August 4th, 1896, is that he

found from the evidence and record before him, that there was fraud on the part of Jacobus, in his commutation proofs of September 20, 1892.

4. That the Plaintiff in Error is not estopped from claiming the title to this land.

5. That no mistake of law on the part of the Secretary of Interior is found to exist.

6. That the findings of the State Court are not supported by evidence.

7. That the Defendant in Error is not a purchaser in good faith.

There are many minor questions discussed in the brief of counsel but we believe the above substantially cover the main points.

ARGUMENT.

In view of the fact that the principal controversy in the state courts has been upon the third proposition, *i. e.*, whether the Secretary of the Interior, in his decision of August 4th, 1896, found that there was fraud on the part of the entryman, Mr. Jacobus, in the making of his commutation proofs, that a determination of this question, if favorable to the Plaintiff in Error will render it unnecessary to examine many of the other questions, and the further fact that the discussion of this question will, to a very large degree, cover the points involved in the other propositions, we think it advisable, and that we can better aid the court in arriving at a correct conclusion, to discuss the third proposition first.

I.

Did the Secretary of the Interior in his decision of August 4th, 1896 (found in the Record, page 272) find that there was fraud in the commutation proofs of September 20th, 1892, or did any of the officials of the Land Department find such to be the fact?

In the discussion of this question, counsel for the Plaintiff in Error dwell principally upon the language of the Secretary, set forth in the closing part of the opinion: "The

evidence in the case at bar clearly shows that the entry was not made in good faith and the proof submitted by the entryman was fraudulent, *as fully set out in your office decision of January* 23, 1895. It is likewise impossible to confirm the entry under the provisions of the Act of June 3rd, 1896, for the same reason, namely, practice of fraud in making proofs. Both the motion for re-view and the motion to confirm are accordingly denied."

It is freely conceded that if counsel for Plaintiff in Error are correct in this construction of the opinion of the Secretary and such opinion is sustained by the evidence, the courts will not review such determination. On the other hand, we confidently maintain that the language of the Honorable Secretary of the Interior, when read in the light of all the attendant circumstances, means just what state courts have held it meant; that the want of good faith and the fraudulent proof, related solely to the *supplemental proof* required to be furnished by Mr. Jacobus in the letter of the Commissioner of May 15th, 1893 (Record 67).

Counsel, in their brief, argue that it is only upon the facts found by the officials of the Land Department that a person can be adjudged by the courts to be entitled to the land, notwithstanding an adverse, erroneous ruling upon some question of law, and refer to the language used by the Supreme Court of Wisconsin in the first opinion, as sustaining that contention, as well as one or two other authorities. We submit that such is not the rule whenever the department fails, by reason of such erroneous ruling, to pass upon the facts. In Lytle vs. The State of Arkansas, 9 Howrad, 314, this court stated the rule as follows, page 333: "It is a well established principle that where an individual, in the prosecution of a right, does everything which the law requires him to do and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him. In this case, the pre-emptive right of Cloyes having been proved and an offer to pay the money for the land claimed by him under the Act of 1830, nothing more could be done by him and nothing more could be required of him under that act * * * * The claim of a pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right, but when cov-

ered by law it becomes a legal right subject to be defeated only by a failure to perform the conditions annexed to it."

This ruling is approved in the Yosemite Valley case, 15 Wall., 91 and in Moss vs. Dowman, 176 U. S., 418. We understand the rule to be well settled that where an entryman does all that the law requires to obtain public lands and he is denied his legal right by erroneous ruling or mis-application of the law by the land department officials, he may recover the land in the courts, after patent, where such facts are shown, and that the department did not determine any fact against him. As for instance: The department officers erroneously determined that the land was not subject to entry, or that settlement and residence did not give a preference right, or, as in the case at bar, the submission of improper supplemental proofs prevented the claimant from coming within the act of June 3rd, 1896. Any other doctrine would practically exclude the courts from any jurisdiction, for the reason that many times, where the land department officials were mistaken as to the law, they would not determine the facts. We allude to this rule at the outset, because counsel for the Plaintiff in Error have criticized the findings of the state courts to the effect that Mr. Jacobus, in his settlement, residence, improvements, occupation, application and proofs upon this land, fully complied with every requirement of law, and we invoke the rule often laid down by this court, that *these findings of fact are not subject to review.*

Egan vs. Hart, 165 U. S., 188;
Stanley vs. Schwalby, 162 U. S., 255;
Bartlett vs. Lockwood, 160 U. S., 386.

In the last case, this court held that it would not review the decision of the New York court of appeals as to whether a car load of rags were ordered by the collector to be disinfected, even though the order, ambiguous in its terms, was in writing. The findings of fact by the trial court, (Record 272, 279) we think cover all the questions involved in the issue and make clear that Mr. Jacobus performed every act required of him to insure his legal right to the land in controversy. These findings are all confirmed by the Supreme Court except as to the entry of Mr. Jacobus relating back to his settlement, and

upon this we think the evidence amply sustains the trial court's conclusion and is rather one of law than of fact.

Under the authorities and for the reasons above mentoined, we approach the discussion of the proper construction of the Secretary's opinion with a little broader view than suggested by counsel of the Plaintiff in Error and we shall maintain that if the department officers found the facts in favor of Mr. Jacobus, or if by reason of an erroneous ruling of law, they failed to find the facts, that it is the duty of the court to give relief, and we call attention that the state courts have found as a fact, that the language of the Secretary of the Interior, above quoted, referred only to the supplemental proofs. (Record 278)

It will be noticed that the brief of counsel for Plaintiff in Error omits any reference to the findings of the department or other evidence relating to the settlement, residence and occupation of Philip W. Jacobus prior to the commutation proofs of September 20, 1892 ,simply alluding to the fact that Mr. Jacobus contested Mr. Hill's entry which was canceled on July 7th, 1892, (page 1 of brief). The testimony of Mr. Jacobus upon the last contest (Rec. 138) shows that he settled upon the land in question in January, 1891, and on February 23rd, 1891, he applied to enter the land and that his entry was not allowed until July, 1892.

It appears from the decision of the Assistant Commissioner, dated April 29th, 1892, (Rec. 38) "That Jacobus' first acts of settlement upon the land were performed January 28, 1891, and on February 4 he moved his family, consisting of a wife, thereon; he has, in the way of improvements, a small house and some clearing, valued at from thirty-five up to one hundred and fifty dollars; his residence on the land has been continuous, though he has been absent a considerable portion of the time, laboring at his trade for the purpose of earning money to support himself and wife and improve his claim."

It appears from the decision of the Register and Receiver (Rec. 264) that "Mr. Jacobus settled on the land before the date of the Wisconsin Central opening, February 23, 1891; that his application for a homestead entry on that day, was rejected because the land was covered by a soldier's declaratory statement, by John F. Hill."

In his homestead affidavit of July 6th, 1892 (Rec. 60) Jacobus states that he settled on the land January 28, 1891, established a residence with his family February 4th, '91, and that his application of July 6th is in lieu of an application dated February 23, 1891, for the same land.

In the commutation proofs, made and filed September 20, 1892, the witnesses Rusk and Augusta both testify that Mr. Jacobus settled upon and established his residence upon this land in February, 1891. The allowance of the commutation proofs and the making of the certificate of entry by the Register September 20th, 1892 (Record 285) the payment for the land and the Receiver's receipt of the same date, (Record 286) would of themselves be evidence of the finding by those officers of full compliance with the law on the part of Mr. Jacobus.

Orchard vs. Alexander, 157 U. S., 377;
Lytle vs. Arkansas, 9 Howard, 333;
Smith vs. United States, 170 U. S., 377.

In addition to this, however, there had been a direct finding of the settlement, residence, application and its rejection by the commissioner, under date of April 29th, 1892, upon a contest between the same parties, wherein Mr. Hill's entry was canceled, followed by the allowance of the application of Mr. Jacobus, made in lieu of his previous one of February 23, 1891.

On December 27th, 1892, more than three months after making his commutation proofs, Mr. Jacobus sold and conveyed the land to the Defendant in Error and one McLeod, and notwithstanding the position taken in the brief of counsel for Plaintiff in Error, we assert that there is not a syllable in the record impeaching the entire good faith of that transaction, much less any evidence which would warrant this court in reviewing the decision of the trial court, affirmed by the Supreme Court of Wisconsin, even though the findings of those courts were open to review here.

Without referring to the evidence in detail, it is very plain that after this sale Mr. Jacobus did not continue to live upon the land until some time in February, 1893, when he first learned that there was some question as to his right to

make his final proof at the time he did so. On May 15th, 1893 (Rec. 67) the Commissioner, referring to the Act of March 3, 1891, and the date of Mr. Jacobus' entry as July 6th, '92, by letter to the Register and Receiver, called upon Mr. Jacobus to furnish supplemental proof showing residence, and cultivation for a period of fourteen months subsequent to July 6th, 1892, with non-alienation affidavit. Mr. Jacobus, knowing that he had conveyed the land, endeavored to avoid the making of such supplemental proof but the Commissioner, under date of July 6th, 1893, held that he must do so. (Rec. 67.)

On September 1st, 1893, the land was re-conveyed to Mr. Jacobus, who, in return gave a mortgage to secure the purchasers for the amount they had paid for the land, (Rec. 288) and on September 12th, 1893, Mr. Jacobus filed affidavits of Mr. McCord, Mr. Kenney, Mr. Augusta and himself, as such supplemental proofs. (Record 261-264) In his own affidavit Mr. Jacobus states that he sold the land on the 27th of December (the word September in printed record is erroneous), 1892, believing he had a right to do so and that he had secured a re-conveyance on September 5th and given a mortgage to the parties and that he made such affidavit "*in lieu of final homestead affidavit, form* 4-069."

It will be observed that nowhere in this supplemental proof is there any suggestion that the land was conveyed back to Mr. Jacobus in order that he might re-establish his residence or procure the land for any other person but upon the hearing of the contest, Mr. Jacobus testified that it was conveyed back simply for the purpose of enabling him to make proof. (Record 157-161.)

Counsel for Plaintiff in Error, in their brief, page 2, speak of these affidavits as "What the defendant has termed the supplemental proofs, called for by the Commissioner October 6th, 1893." If the Defendant in Error or his counsel were the only persons terming these affidavits supplemental proofs, the statement might be warranted, but unfortunately for counsel, the record makes this too clear for argument. The Assistant Commissioner, in his letter of November 18th, 1893, in reviewing the objections made by Mr. Jacobus to allowing Mr. Hill to contest his entry (Rec. 69), says: "Said

commutation, being prematurely made, you were directed by my letter "C," May 15 ,1893, to require supplemental proof which was forwarded by you September 22, 1893." In the opinion of the same officer, dated February 24, 1894, (Rec. 69) he says: "September 22, 1893, you forwarded corroborated affidavit of Jacobus and McCord, filed in your office July 12, 1893, as *a response to the call for supplemental proof and you forwarded a protest by Hill against the acceptance of such supplemental proof, on the ground that Jacobus had abandoned the land, etc.*" In the opinion of the Register and Receiver, August 9, 1894, (Rec. 264) they say: "The proof being premature, he was required by letter "C," May 15th, 1893, to make supplemental proof, which was offered September 20th, and transmitted to the General Land Office September 22, 1893." And on page 265—"September 12, 1893, the day of making supplemental proof, Jacobus and wife executed a mortgage," etc. Page 266—"We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained." In the opinion of the Commissioner of January 23, 1895, (Rec. 268) he says: "But still a conveyance of the land is clearly proven, it is also shown clearly that the land was re-conveyed to defendant so that he could submit his *final supplemental* proof for the benefit of McLeod and McCord." These papers, if correctly copied in the record will be found endorsed as supplemental proofs and they were sent specially to the Register and Receiver to be present and considered in the contest, (Rec. 286) showing minutes on the certificate of entry "Supplemental proof returned to R. and R. for use at hearing by H., April 18th, '94, and attorneys advised. C. C. M." Counsel for the Plaintiff in Error may be excusable in endeavoring to avoid these papers being considered as the supplemental proofs which were offered and rejected, in view of the fact that they have a very important bearing in the case against the position which they assume.

It was under the circumstances above stated that Mr. Hill, who testifies (Rec. 121) *that he was keeping a close watch on Jacobus in* 1892 *and in* 1893, *in order to contest his entry,* protested against the supplemental proof as stated in the opinion of Commissioner Bowers at page 69, and then filed his contest affidavit shown, Record 292 and 293, with the corroborative affidavits of Charles Helmer and A. B. Ross.

In this affidavit Mr. Hill states that Mr. Jacobus "did not settle upon or enter said land in good faith for the purpose of making it his home, but for purposes of speculation. On September 20th, 1892, Jacobus made final proof and commuted and within a short time sold timber and all of the land and wholly abandoned the land and has since continued to abandon the land and for a period of over six months next prior to the *date hereof.* (September 30, 1893) Jacobus and witnesses testified falsely in making his final proof * * * * affiant has been informed and verily believes that W. E. McCord, who purchased the land and timber, deeded the land back to Jacobus in order that Jacobus might make the supplemental proof required by the Hon. Commissioner, and has offered said Jacobus a salary if he would live on the land till patent issued. In spite of his abandonment and in spite of the fact that Jacobus has not lived on said land, in order that he could make the supplemental proof required by the Hon. Commissioner's order, Jacobus went to Ashland on September 8th, 1893, for the purpose of making supplemental proof," etc.

It will be observed that in this affidavit, much stress is laid upon Mr. Jacobus' having abandoned the land, having sold it, and that he was endeavoring to regain the land and make supplemental proof for the benefit of other persons. The corroborative affidavit of Mr. Ross is confined wholly to the conveyance of the land and the deeding of it back to Mr. Jacobus so he could make supplemental proofs. (Rec. 294). The corroborative affidavit of Mr. Helmer, while in general terms, states more, yet states no particular fact to be within the knowledge of the witness except that Jacobus had abandoned the claim. Upon these affidavits, the Commissioner, under date of November 18, 1893 (Rec. 259) by letter "H," referred the contest to the Register and Receiver at Ashland, Wisconsin. The Commissioner states the contest in this language: "Hill alleges in substance, by affidavit of himself and others, that the entryman never settled upon the said land in good faith to make it a home but for the purpose of speculation; that he did not reside on the land during the *six months next preceeding the making of his proof*, but instead lived at Iron River with his family, where he kept a barber shop, and that he has sold the land to one W. E. Mc-

Cord." While the statement of the contest in this letter is broad enough, perhaps, to permit the local officers to go back of the Commissioner's decision of April 29th, 1892, and the commutation proofs made to their satisfaction on September 20, 1892, it is a significant fact that the charge in Mr. Hill's affidavit of the abandonment of the land for a period of six months *next prior to the date of same, September* 20th, 1893, should be stated in the Commissioner's letter as *six months next preceding the making of his proof.* If the supplemental proof is intended by the Commissioner, the two dates are at once harmonized, for the supplemental proof was forwarded with Mr. Hill's protest and his contest affidavit followed within a very few days. The letter in no way refers to the *commutation* proof, which, as the law was then interpreted by the Commissioner, was of no consequence, being made within ninety days of the entry, when fourteen months was understood at this time to be necessary. No reference is made in the letter to the statement in Mr. Hill's affidavit that Mr. Jacobus and his witnesses had testified falsely in making such proof. On motion for review of this permission to contest, the Commissioner, under date of February 24th, 1894, refers to the forwarding of the supplemental proof and the *protest by Mr. Hill against the acceptance of the same on the ground that Jacobus had abandoned the land.* The protest of Mr. Hill does not appear in the record in detail, but the charge in it seems to be largely the basis of the contest. Whatever may have been intended by the Commissioner, it is very plain that the Register and Receiver understood that the gist of the contest was abandonment of the land and the sale of the same being abar to the offering of supplemental proof. (Rec. 264). This may have been partially induced by the position of Mr. Hill's counsel on the contest, (Record 139) where he objected to any evidence being received as to residence, occupation or improvements prior to July 6th, 1892, and claiming that the contest as submitted, only covered the time subsequent to that date. He again (Record 170) entered a general objection as to all questions relating to 1891.

The testimony taken upon the contest is quite voluminous, pages 71 to 214. Counsel for Plaintiff in Error in their brief, pages 27 and 28, refer to two or three statements by Mr. Jacobus and his wife. We have had some difficulty in finding

the testimony so referred to. The first reference is to Mrs. Jacobus' testimony (Rec. 142) and quotes only a part of a single answer where the witness was asked "What times were you on the place during the spring and summer season of 1892, if you can tell?" At page 148 Mr. Jacobus testifies that he was there about one-half the time and (Rec. 149) that he was on the land in '91, three weeks at a time helping to make the improvements. In the season of '91 Mr. Jacobus worked at his barber trade in Superior, some thirty miles from the land, but worked at Iron River, the town in which the land lies, from last of April, 1892, about the time of the Commissioner's decision of April 29th, 1892, awarding him the land. (Rec. 38 and 152). He continued to work at his barber trade at Iron River, only a short distance from the land, was out there every Sunday and two or three days in the week. (Rec. 155). Record 160 he says: "I believe that that was my home; my family lived there and I lived there as much as I could when I was not away earning a living for us. We had no other home; did not have any home anywhere else." The testimony of Mrs. Jacobus immediately following the reference on page 28 of counsel's brief, speaking of the spring of 1892: "Easter was in April, then I went back in April and stayed a few days after Easter; then I went back in the claim. I don't know just when Easter was then. I stayed all the time until June, it was between the middle or last part of June when I came in." (Rec. 174). I went back on Sunday after the 4th and remained there until we proved up, I didn't go to town at all. Then I went to town and went back again and stayed until the last of November or December."

The testimony of Mr. Jacobus and his wife and in fact all of the witnesses on the contest, with the possible exception of Mr. Hill, make the improvements by way of clearing, buildings, fencing and cultivation as extensive and valuable as any statement contained in the commutation proofs. The testimony of Mr. and Mrs. Jacobus, shows beyond cavil that their home and only home was upon this land, Mr. Jacobus having a barber shop only a few miles distant, and was treasurer of the town where his homestead claim was located. It is true that Mr. Jacobus spent the larger part of his time in his barber shop working at his trade, but was improving

his claim as fast as his means would permit, his wife being there nearly all of the time with his household furniture and effects.

After hearing all of the testimony, the Register and Receiver made their findings and rendered their opinion on August 9th, 1894, which counsel for the Plaintiff in Error are pleased to term a report. (Rec. 264-266). In this opinion, after stating the gist of the contest: (1) Did Jacobus abandon the land? (2) Was the sale of the land to McLeod and McCord a bar to the offering of supplemental proof? They say, upon the first point, the testimony of the witnesses is extremely conflicting. It is admitted by Jacobus that he worked at his trade at Superior and Iron River most of the time during his occupancy of the land but it seems also fairly well established by the testimony of Mrs. Jacobus and numerous other witnesses that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment were superior to those of most homesteaders and the clearing, in extent and cultivation, compared favorably with that of others in the same neighborhood." They then refer to the learning of the supplemental proof and the return to the land and the offering of the supplemental proof and continue: "Upon the whole the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof, but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof, in order to secure title to his transferees." They then refer to the sale of the land in December, '92, and the re-conveyance September 1st, and the execution of a mortgage September 12th, 1893, the day of making the supplemental proof; that the sale was absolute and the subsequent residence of Jacobus upon the land was as agent of the transferees and for the purpose of acquiring title for them. It is taken for granted that the deed back was made in good faith, but the slender residence of Mrs. Jacobus in the summer of 1893 was not upon the homestead of Jacobus but upon the land in which he had no claim or interest; concluding the opinion as follows: "That the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees, we are of the opinion therefore, that Jacobus'

supplemental proof cannot be sustained and the entry should be canceled and the preference right of entry awarded to the contestant Hill." It is too plain for argument that the Register and Receiver found in favor of Mr. Jacobus as to his residence, occupation and improvements of the land, and canceled his entry because the supplemental proofs were not made in good faith for his own benefit and could not be sustained.

On appeal to the Commissioner, after referring to the statement in the appeal and the letter of May 15th, directing Jacobus to furnish supplemental proof, he says: (Rec. 267) "It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200; he did not have any stock of any description; no chickens or other poultry; that on December 27th, 1892, defendant sold said land to David McLeod and Warren E. McCord for $5250 cash. On the question of residence, the testimony is very conflicting. Defendant's wife stayed on the land part of the time and defendant worked at his trade; he made occasional visits to the land on the Sabbath day. It also appears that defendant *obtained three rooms in Iron River after he had sold the land* and he, with his wife, moved into them; that after defendant learned that he was required to furnish supplemental proof, because his commutation proof was premature, his wife moved back to the land but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day." He then quotes the testimony of Mr. Jacobus that he continued to reside upon the land so that the men who bought it would not be the losers by it; that was the reason and the only reason, and that the land was conveyed back to him for the purpose of enabling him to make the proof and clear the title. After discussing three cases in the Land Department, all touching the question of permitting supplemental proofs to be made, concludes the opinion as follows: "The sale and conveyance of the land is clearly proven and it is also clearly shown that the land was re-conveyed to the defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord, hence your opinion is affirmed and this homestead and his cash

entry for the land involved, is held for cancellation." It will be noticed that the portion of the Commissioner's decision in which he touches upon the residence of the claimant, follows immediately the reference to the sale of the land on December 27th. He then passes the question of residence simply with the remark that the testimony is very conflicting and after alluding to the defendant's working at his trade in Iron River (not in Superior, where he was more than a year after his first settlement) he then takes up the renting of rooms in Iron River after the sale of the land and its re-conveyance for the purpose of making supplemental proof and clearing title. There is not a syllable in this opinion indicating that the Commissioner held or intended to hold that Mr. Jacobus' residence up to the time of the selling of the land was not satisfactorily established, as found by the Register and Receiver. In the closing paragraph, the Commissioner affirms the opinion of the Register and Receiver squarely upon the ground that the *final supplemental proof* could not be sustained. Even assuming his statement that the testimony regarding the residence was very conflicting, referred to the time anti-dating the sale of the land, it would be far from holding that Mr. Jacobus' residence was not upon the land or that the weight of the testimony was not in his favor. Nor does the fact that he worked at his trade in Iron River in any way indicate that his residence was not upon the land.

It will be observed that neither the Register and Receiver or the Commissioner, in their opinions, refer to the commutation profs of September 20th, 1892, or to any false statement therein, nor do they compare the testimony given upon the contest with any of the statements made by Mr. Jacobus or his witnesses in making such commutation proof. Both opinions refer explicitly to the supplemental proofs and it is plain that the conclusion reached in each of the opinions is based upon such proofs, and the endorsement on the certificate of entry (Rec. 268) shows that the supplemental proofs were sent them to be considered. Again, a full reading of the testimony and proceedings upon the contest including a lengthy cross-examination of Mr. Jacobus and William Rusk, one of the witnesses making the commutation proofs and also upon the contest (Rec. 61 and 203) shows there is no suggestion or question indicating that it was claimed that

they had testified falsely in making such proofs. In fact as before alluded to, Mr. Hill's attorney on the contest claimed that there was no issue as to Mr. Jacobus' residence prior to July 6th, 1892, being nearly the entire period covered by such proofs, and it seems the other witnesses to the commutation proofs, Herbert H. Augusta (Rec. 63) is the identical person mentioned in the Secretary's opinion (Rec. 272) to whom a special dispensation was granted, and his entry confirmed to his grantee, without supplemental proofs being made.

The whole opinion of the Commissioner shows beyond controversy that he was dealing with this case as an application to confirm the entry and allow the title to pass notwithstanding the sale, contrary to the technical provisions of law. In other words, he had already ruled that under the statute of March 3rd, 1891, fourteen months residence was necessary subsequent to the allowance of the entry (Rec. 258) and the sale and conveyance of the land being admitted, he was trying the application as one addressed to his discretionary power, and Jacobus, having concealed the fact in his suppiemental proofs, thatthe land was conveyed back to him in order that he could make the proofs for other persons, he therefore disallows the application, referring to the three cases mentioned in the opinion, all of which are applicable to that view; inapplicable if the Commissioner had determined that Mr. Jacobus never resided upon the land and his commutation proofs were false. The quotation from Cann vs. Connor is: "After the submission of final proof and hearing had thereon, *additional time will not be given in the presence of an adverse claim and where bad faith is evident.*" What additional time did Jacobus require? Simply to make his *new residence* complete. When was the adverse claim made? More than a year after his commutation proof. What bad faith? Attempting to *make his residence good to secure the land for his grantees.* Take the Laird case. "One who enters with no intention of establishing residence in good faith." Jacobus went back into possession after leaving the land, *to make proofs for his grantees,* "and subsequently submits fraudulent final proof." Jacobus, after returning to the land, submitted his final supplemental proofs. They were called for because his commutation proofs were premature.

The Dougherty case referred to by the Commissioner makes this construction altogether certain. The request *"to make a new entry was denied, for the reason that he could not make a homestead entry for the benefit of another."* Then follows the closing paragraph: "The sale and conveyance of the land is clearly proven and it is also clearly shown that the land was re-conveyed to defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord, hence your opinion is affirmed." We submit it is too clear for argument, that the Commissioner in his opinion, is dealing with Jacobus' effort to move back upon the land, acquire a new residence of six months and then prove up for the benefit of others. In effect an application to make a *new entry* as in the Dougherty case. There is no finding of any bad faith or fraud in the Commissioner's opinion. The only reference to either is in the quotations from the authorities cited and these references are all to the point of allowing Jacobus to return to the land to make title for another.

The case then went to the Hon. Secretary of the Interior, who, under date of April 28th, 1896 (Rec. 268), affirms the decision of the Commissioner in this language: *"Said decision fairly sets forth al lthe facts in this case,* and the conclusion therein reached is sustained by the testimony and is in conformity with law and the decisions of the Department and is hereby affirmed." Can it be for a moment maintained that, if the *decision of the Commissioner was based upon the lack of residence* of Mr. Jacobus from *February*, 1891, to September 20*th*, 1892, *or that he had testified falsely in making* his commutation proof, *that such opinion set forth all of such facts?* On June 8th, 1896, after the passage of the act of June 3rd, but before any rule had been promulgated by the department, two motions were made to the Secretary of the Interior, one to review the decision already made, the other to confirm, under the act of '96 (Rec. 269-272.) In the motion to review, the application is still treated as one for equitable consideration as in the Augusta case, 21 L. D. 200, while the one to confirm is based upon the act of June 3rd, 1896.

Upon these motions, and with the full record of the contest before him, the Honorable Secretary of the Interior delivered his opinion of August 4th, 1896 (Rec. 272), upon which counsel for the Plaintiff in Error base their claim of a finding to the effect that Mr. Jacobus never resided upon or

properly improved the land and that his entry from the beginning was fraudulent and the commutation proof made September 20th, 1892, was false, and for this reason the courts have no jurisdiction, because the Secretary of the Interior decided these facts against Mr. Jacobus and canceled his entry. It will be borne in mind that, except the motion to confirm upder the act of 1896, all of the proceedings, including the three opinions referred to and the motion for review of the same, were upon the supposition that upder the act of March 3rd, 1891, fourteen months actual residence was required *subsequent to the allowance of the entry on July 6th*, 1892, and that the proceedings were *equitable in their nature, following the Augusta case*, and that the supplemental proof was the only proof which would be pertinent to that inquiry. In other words, the conveyance of the land having been made three months after the commutation proofs and five and one-half months after the allowance of the entry, and the Secretary being asked to disregard the technical application of the statute for fourteen months' residence ,and the supplemental proofs being submitted for that purpose, the language of his opinion becomes, to our minds, quite clear and the refusal to review, stated in the third paragraph, is placed squarely upon the supplemental proof. The Secretary, after alluding to the Augusta case, says: "The evidence in the case at bar clearly shows that the entry was not made in good ftaih and the proof submitted by the entryman was fraudulent, *as fully set out in your offi e decision of January 23d*, 1895."

The last line of the paragraph referring to the decision of the Commissioner of January 23, 1895, *would be false* if the proof intended was that of September 20th, 1892, which was in no way referred to in that opinion. And the other part of this paragraph, to-wit: "The evidence in the case at bar clearly shows that the entry was not made in good faith," is, in our opinion, also qualified by the last line as being fully set out in the opinion of the Commissioner. On the other hand, if we are correct in our construction that the evidence to which the Secretary alludes is that quoted in the Commissioner's decision, from Mr. Jacobus' cross examination, in which he testified that the canveyance back was for the purpose of enabling him to acquire title for other persons and

that the conveyance of the land was clearly proven, then the closing line of the Secretary' sopinion, above referred to, is not only a correct reference to the Commissioner's decision but is true in every sense of the word, and the lack of good waith lay in the circumstance that Jacobus had taken a re-conveyance and sought to acquire the land for the benefit of others *without disclosing that it was for the benefit of others,* until he testified upon the contest; and it was doubtless this concealment which led to the Secretary's conclusion of lack of good faith.

II.

Was Philip W. Jacobus within the Act of June 3rd, 1896?

Counsel for the Plaintiff in Error, in their brief, 17 and 18, enumerate in seven paragraphs the essential elements to bring the entryman within the Act of '96 and we accept and repeat such enumeration:

1. That an error has heretofore been made by the officers of the local land office in receiving premature proof under the homestead laws.
2. That there was no fraud practiced by the entryman in making such proof.
3. That final payment has been made.
4. That a final certificate has been issued to him.
5. That there are no adverse claimants to the land, whose rights originated prior to such final proof.
6. That no other reasons exist except the making of such premature commutation.
7. That there was at least six months actual residence by the entryman prior to such commutation.

Counsel concedes that the first, third and fourth of these would be determined by the record and it would be difficult to maintain any other view, especially with the record then in the office of the Secretary, held there by the motion to review. The allowance of the entry, July 6th, 1892, the premature commutation proofs, September 20th of the same year and the passage of the act of 1896 would seem to be sufficient to cover the first point. The third and fourth are proven by the Receiver's receipt (Rec. 286) and the certificate of entry (Rec. 285.) We are unable to discover any reason

why the fifth condition is not also to be determined by the record. The endorsement on the certificate of entry seems to be a complete record of the transactions in regard to this land from the time of the allowance of the homestead entry by Jacobus, July 6th, 1892, to the cancellation of the cash entry, September 10th, 1896. (Rec. 285 and 286). The tract book of this land was put in evidence (Rec. 288) and shows the complete history of the land from July 6th, 1892 to the patent January 11, 1897. The contest awarding Mr. Hill a preference right and cancelling Mr. Jacobus' entries and all proceedings therein, were a matter of record, and was still pending before the Secretary, both Jacobus and Hill claiming to occupy the land. We think this entirely sufficient to satisfy condition number five. See also finding of State Court, Rec. 278.

Numbers 2, 6 and 7 were also fully covered by the record then made up. A large amount of evidence had been taken and both claimants to the land were before the department and had notice of this application. If there was any error in determining the rights of these claimants to this land before the Secretary and upon the evidence and documents on file in the contest proceedings without requiring new evidence to be given, it was an error on the part of the Secretary of the Interior in so deciding the case upon the merits and excluding Mr. Jacobus from the benefits of that act, without proper proceedings before the department, this, of itself, would be a mistake of law and would give the court jurisdiction to find the facts, and it has done so.

Counsel in their brief, 18, say: "How could the Commissioner determine whether fraud had been practiced in making proofs from the record itself? If fraud appeared on the face of the proofs, there certainly would have been no commutation certificate or entry and hence the act would have no application."

Counsel seem to overlook their strenuous claim that the Secretary of the Interior did find such fraud from the record before him in the contest proceedings, before the motion to confirm was made. We have endeavored to show that this position is unsound but it is quite evident that the Secretary of the Interior, with the entire proceedings before him, had

ample opportunity to find such fraud, if it had existed. Counsel contend that there should have been new proofs presented instead of those consisting of the evidence taken upon the contest, all of the opinions of the department officials and the records and documents on file in the department. Why ex parte affidavits would have been more satisfactory than such record is not pointed out. The circular referred to on page 19 of counsel's brief, was not issued until after these motions were submitted and we believe not until after they were heard.

Counsel maintain that the six months residence required by the act, must have been subsequent to the date of the allowance of the entry July 6th, 1892. The language of the act is: "Six months actual residence in good faith by the homestead entryman on the land *prior to such commutation.*" In view of the errors which Congress was endeavoring to correct, (the acceptance of premature proofs, less than fourteen monthe after the allowance of the entry) it would be very strange if that body sought to require six months residence after the entry under the new law, that it did not say so, instead of providing the requirement in regard to residence to be a different time (six months) prior to the making of commutation proofs. We confess we are unable to appreciate the argument of counsel on this point. Section 2301, giving the right of commutation to a homestead entryman, states that it may be made "at any time before the expiration of the five years, on making proof of settlement and cultivation as provided by law granting pre-emption rights." Sections 2259 to 2266 covering the subject of pre-emption claimants, nowhere provides for six months residence after entry or after making any claim to the land, and the six months residence required by rule of the Department, was after settlement and not after entry.

Lambert vs. Fairchild, 5 L. D., 675;
4 L. D., 287 and 418;
6 L. D., 234 and 573.

In Kuepper vs. Tripp, 26 L. D., 561, the entry was confirmed under the act of '96 by the Secretary of the Interior, even though only four months elapsed between the date of the entry, April 22, 1891, and commutation proofs, August

25, 1891. See discussion by Wisconsin Supreme Court, Rec. 31.

Counsel contend that the application should have been made direct to the Commissioner and that the Secretary had no jurisdiction. The case of Kuepper vs. Tripp, supra, indicates that the Secretary of the Interior did not so regard the law, for he confirmed that entry on appeal in a contest proceeding, without the Commissioner taking cognizance, under the act of 1896. In Anders vs. Hasselquist, 24 L. D. 351, the Secretary of the Interior confirmed the entry under the act of '96, after it had been held for cancellation by the Commissioner, and without application to the Commissioner to confirm under that act.

Attorney General McVeagh rendered an opinion reported in 19 A. G. Op. 205, upon this question: "Has the Secretary of the Interior jurisdiction to review decisions of the Commissioner of Patents, rendered under Rule 110, Rules of Practice of the Patent Office, and overrule motions to amend preliminary statements in interference cases." And in that opinion reviewed many of the statutes, decisions and precedents, reaching the conclusion that the Secretary, under his supervisory power had jurisdiction. We think the cases in this court are too numerous to necessitate discussion of this question, the rule being settled that the Secretary of the Interior, as the head of the Land Department of the United States, has jurisdiction and power to review the action of the subordinate officers, and may do this on appeal or by direct order and may take the initiative in any proceedings over which the department has control.

Knight vs. Land Association, 142 U. S., 161;
Orchard vs. Alexander, 157 U. S., 372;
Michigan Lumber Co. vs. Rust, 168 U. S., 589;
Snyder vs. Sickles, 98 U. S., 203.

In Buena Vista vs. Railroad Company, 112 U. S., 165, an Act of Congress authorized the Commissioner of the General Land office to select swamp lands and it was held that the Secretary had original jurisdiction.

Counsel argue, pages 21 and 22 of their brief, that Mr. Jacobus' entry was canceled ipso facto by the Secretary's af-

firmance, dated April 28th, 1896. The endorsement on the certificate and minutes in the land office show that it was not canceled until September 10th, 1896. The letter of the Commissioner to the Register and Receiver at Ashland, Wisconsin, (Rec. 289) informing them of the denial of the motion for review and stating: "Said case is accordingly closed; notify the parties in interest; the entries are hereby canceled; so advise Hill and of his right to enter the land"; is dated September 10th, 1896. Under rules 66 and 67 of the Land Department (see Mathews & Conway, digest of 1888, XIX), whenever a motion to review is made, the case is held and cancellation does not take effect. In James vs. German Insurance Co., 89 Federal Rep., 811, 46 C. C. A., 476, same case, 107 Federal 597, the circuit court of appeals of the Eighth Circuit held that the entry was not canceled until communicated to the local officers. The case reviews the rules and decisions of the department and we submit, the conclusions are correct. Rule 114, 23 L. D., 707 expressly provides that a motion for review before the Secretary operates as a supersedeas.

Counsel argue that the land was re-entered within the meaning of the last clause of Sec. 1 of the Act of June 3rd, 1896, because Mr. Hill had been awarded a preference right. If we are correct in our position as to the cancellation of Mr. Jacobus' entry, this argument is already effectually answered. If we are not, we think it is too clear for argument that a mere preference right is not such an entry or segregation of the land as would prevent the act of Congress operating in favor of the former claimant. It is shown by the record that Mr. Hill did not enter the land until September 7th, 1896.

Davis case, 19 L. D., 489.
Hendrickson, 13 L. D., 169.

It is contended by counsel that the fact that Mr. Jacobus sold and conveyed the land in question is evidence of his bad faith in making the entry and they cite several departmental decisions touching that phase of the case but none of them, as we believe, in point. It has frequently been held that a sale of land after the final certificate issues is but

an exercise of the legal right of the holder and is no evidence of improper conduct.

Myers vs. Croft, 13 Wall., 291;
Murphy vs. Barron, 4 L. D., 134;
In re Leman, 8 L. D., 486.

Certainly there is no finding in the department that this sale was not bona fide and the courts have held affirmatively that it was made in good faith.

IV.

Is the Plaintiff in Error estopped from asserting any fraud on the part of Mr. Jacobus prior to the purchase of the land by McCord and McLeod, December 27th, 1892? Has this court jurisdiction to review that question?

The Supreme Court of Wisconsin held that he was so estopped, and upon that ground the plaintiff in error must be held to hold the title to this land in trust (Rec. 301.) Counsel for the Plaintiff in Error, at pages 35 and 36 of their brief, set out a part of Mr. McCord's testimony and state that it is all he gave on that subject, in which they are mistaken. Mr. McCord further testified: (Rec. 239) "I had a conversation with Mr. Hill prior to that, as to Mr. Jacobus' desiring to sell his land. Mr. Hill called my attention to it, said that Jacobus had a good claim and he wanted to sell it, and advised us to buy it; I mean myself and McLeod." Also that Mr. Hill knew that they were looking over the land with a view to buying it, and, at page 240, that they relied on Mr. Hill's statement, and paid for the land for that reason. Mr. McLeod testified substantially the same, (Case 247) and the court found in accordance with this testimony. (Rec. 276.)

Counsel for the Plaintiff in Error make an unwarranted attack upon the opinion of the state court, stating at page 37 of their brief, that the court in the first opinion held that there was no estoppel, and in the last opinion that the Plaintiff in Error was estopped. The court did not hold in the first opinion that there was no estoppel, except that Mr. Hill was not estopped as to anything which occurred *after* the purchase by McCord and McLeod, the court having held that Mr. Jacobus' entry was cancelled by reason of the supple-

mental proofs, and his conduct with reference thereto, all of which occurred after the sale of the land; that Hill was not estopped from setting up a claim to the land by virtue of such subsequent occurrences. (Rec. 25.) In the last opinion the estoppel is so limited, as that Mr. Hill should not be allowed to set up any conduct of Jacobus prior to the sale, citing many authorities, some of them decisions of this court. (Rec. 301.) Counsel argue that there can be no estoppel for the reason that it would be against public policy that the title procured by Mr. Hill should pass to any other person after patent issued to him. We venture to say that thtre are many cases where the courts have determined that another claimant should have been given the title, where the departmnt had determined and patented the land to a homesteader. It is argued that if Mr. Hill had made an agreement with Mr. McCord to convey the homestead to him, it would have been void and that it would not have enured in case he had given a warranty deed. To our minds, this is not at all decisive of the qrestion, in view of the fact that the laws of the United States give preference to a successful contestant. In Sheply vs. Cowan, 91 U. S., 330, this court recognizes the right of such preference. Mr. Hill was residing upon this land at the time Mr. McCord and Mr. McLeod purchased it. He was the only individual who, up to that time at least, had made any attack upon Mr. Jacobus' claim. He had been beaten in such a contest. He knew that Mr. Jacobus had paid for the land and received his final certificate and receipt. He then advised Mr. McCord and Mr. McLeod to buy the land, recommending Mr. Jacobus' title. It develops later in his contest, that during the year 1892 and evidently at the very time he was making this recommendation, he was watching for an opportunity to make this contest. (Rec. 121). His immediate protest against the supplemental proof of Mr. Jacobus, which was forwarded with such proof, and his statement in his affidavit (Rec. 293) that he entered objection to it, as he believed, before it was filed, indicates clearly that he was on the alert to obtain this claim and it is not beyond the probabilities of the case that he was advising this purchase with the very object in view to disqualify Mr. Jacobus from obtaining the land.

There is ample evidence in the record, and the findings

of the state courts, not reviewable here, make it a verity in the case, that Mr. Hill through fraud induced the defendant in error to buy the full equitable title held by Jacobus, disclaiming any interest on his part, stating that he had been fairly beaten, which was the equivalent of Jacobus' entry being made in good faith and that Jacobus had a good claim or good title. Can Mr. Hill, after doing this and inducing the Defendant in Error, to part with his money be allowed, as against the Defendant in Error, to assert precisely the contrary of the recommendations made at the time of and as an inducement to such purchase? We do not claim that this estoppel could operate to deprive the United States government of this land, no such question arises here. As in Schulenberg vs. Harriman, 21 Wall., 44, the controversy is strictly between private parties, the United States is not interested, and the Plaintiff in Error in no way represents it. In Shepley vs. Cowan, 91 U. S., 330, Mr. Justice Field said: "But whilst * * * * no vested right as against the United States is acquired until all the pre-requisites for the acquisition of the title have been complied with, parties may, as against each other ,acquire a right to be preferred in the purchase or other acquisition of the land, when the United States had determined to sell or donate the property. In all such cases the first in time in the commencement of the proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

Mr. Jacobus, having received his final certificate and paid for the land under circumstances well known to the Plaintiff in Error, was in a position to sell the equitable title, which as held by this court in Stark vs. Starrs, 6 Wall., 402, carried the right to the patent. The Defendant in Error would be fully justified in purchasing such title, upon the disclaimer and recommendation of the Plaintiff in Error. As between the parties to this action, the Wisconsin courts have held that in equity, Mr. Hill's mouth is closed from asserting anything contrary to his previous statements which induced Mr. McCord and Mr. McLeod to purchase this land; that an equitable estoppel arises under the circumstances; which will not permit the Plaintiff in Error to change his position to the detriment of Mr. McCord. In addition to the

cases cited in the opinion of the Wisconsin Supreme Court, at page 301 of the record, we refer to the following:

Wheelton vs. Hardisty, 8 El. & Bl., 231, 262.
Graves vs. Begelow, 6 Vesey, 174, 182.
Slim vs. Croucher, 1 DeGex. F. & J., 518, 522, 524.
Dickerson vs. Colgrove, 100 U. S. 580.
Zabrieskie vs. R. Co., 23 How., 397.
Pendleton Co. vs. Amy, 13 Wall., 297, 305.

To our minds, it is no answer to this argument that a contract on the part of Mr. Hill to sell his homestead right or interest before final proof would be void or that if he had given a warranty deed, the after acquired title would not enure, for the reason that in such case, one claiming title would be claiming under and through Mr. Hill, while in the case at bar the proposition is that while the title passed to Mr. Hill is valid between him and the United States, Hill procured that title by fraud upon Mr. McCord and therefore cannot now be permitted to assert it.

The question of estoppel is one of general law and therefore the decision of the state courts are final. In Rutland Railway vs. Vermont Railway, 159 U. S. 630, the Supreme Court of Vermont held that the law of the state requiring the lessee of a railroad to pay taxes, did not impair any obligation of the contract and further decided upon the ground of laches that there could be no recovery. In the opinion of this court, it is said that the decision against the Plaintiff in Error, upon an independent ground not involving a federal question and broad enough to support the judgment, the writ would be dismissed. In Young vs. Steamship Company, 105 U. S. 41, an action was brought to recover back illegal fees collected by a United States Ship Commissioner and this court refused to re-examine the question of whether the payment was voluntary or otherwise, it not being a federal question. In Eustis vs. Bolles, 150 U. S. 1, the Supreme Court of Massachusetts held that the acceptance of a dividend in insolvency proceedings barred the creditor's claim, although the proceedings would not of themselves have discharged the debtor; which question, this court refused to review. In Peirce vs. Railway, 171 U. S. 641, the Supreme Court of Maine held, first that a statute of that state did not impair the obligation

of the contract but further held that the plaintiff was estopped from raising the question. This court dismissed the writ of error, holding that the estoppel was not a federal question.

In Pittsburg Iron Co. vs. Cleveland Iron Co., 178 U. S., 270, the principal question involved was the title to land in a lake bed under United States patents, it appeared however that the Michigan court rested its decision upon the ground of estoppel, and that there was no federal question, and the case dismissed.

V.

Was there a mistake of law found to exist?

Counsel, at page 40 of their brief, argue that the mistake of law alleged in the complaint was not found by the court. The allegation (Rec. 51) is, that the Department of the Interior held that Mr. Jacobus was precluded from making supplementary proof by reason of having conveyed the land and that the supplemental proof became immaterial and unnecessary under the act of June 3rd, 1896.

The opinion of the Register and Receiver, of August 9, 1894, that of the Commissioner of January 23, 1895, and both opinions of the Secretary are set forth in full (Record 44 to 52) in each of which it appears that the supplemental proofs were disallowed and why they were disallowed, and the court's finding (Rec. 277 and 278) is strictly in accordance with the allegations of the complaint, except that the complaint does not allege any fraud or concealment in the supplemental proofs other than as it appears in the opinions referred to.

VI.

Are the findings of fact supported by the evidence?

Counsel for Plaintiff in Error criticize the trial court for making findings upon the evidence submitted on the contest, as if this was an original question for the court. We have already discussed the circumstances under which this would be proper. If it should be determined by this court that the findings of the Department were in favor of Mr. Jacobus, then we concede that the trial court's findings upon the same facts would be rendered immaterial. If this court

should determine that the officers of the Land Department canceled Mr. Jacobus' entry by reason of the supplemental proofs not being sustained or because they were attempted to be made for the benefit of other persons and therfore to that degree fraudulent, and did not for that reason, determine any other necessary fact in favor of or against Mr. Jacobus, then we submit, it was the duty of the court to make such findings. We contend that the findings of the court are in no way contrary to any fact found by the Land Department, and that each and all such findings are fully sustained by the evidence in the case.

VII.

Was the Defendant in Error a purchaser in good faith?

Counsel argue that Mr. McCord was not a purchaser in good faith, regardless of the findings of the trial and Supreme Courts of Wisconsin to the contrary, and they assert that if there was any concealment or fraud in the supplemental proofs, Mr. McCord was a party to it. The affidavit of Mr. McCord, submitted as a part of the supplemental proof (Rec. 261 and 262) bears date September 5th, '93, and is sworn to in Bayfield County. It states that they paid full value for the land believing that the entryman's title was valid and without any pre-arrangement, plan or agreement; that the reconveyance was made to protect the entryman. There is nothing in the affidavit indicating any improper purpose or that the purchase was not made in the best of faith, Mr. Jacobus having the duplicate receipt; that when it was found that he did not have proper title, it was conveyed back. Mr. Jacobus' affidavit and that of the other witnesses were made at a different place and at a different time. There is not a word of testimony taken on the contest which connects Mr. McCord with any improper conduct nor is there any testimony to that effect, and the court has so found.

In the opinion of the Supreme Court of Wisconsin (Rec. 302) the decision of the trial court is overruled wherein that court held that Mr. Jacobus' entry related back to his settlement, under the Act of May 14th, 1880, 21 Statutes at Large, 140, Section three of which is as follows:

Sec. 3. "Any settler who has settled or who shall here-

after settle on any of the public lands of the United States, whether surveyed or unsurvyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record and his right shall relate back to the date of settlement, the same is if he settled under the pre-emption laws"; that, having made his application of February 23rd, 1891, and such application being rejected because of Mr. Hill's S. D. S. being already filed, which filing was contested and Jacobus' entry allowed on July 6th, 1892; that the initiation of his right anti-dated the passage of the act of 1891 and that his entry related back to the time of his application and therefore, that his commutation proofs were sufficient, being more than fourteen months residence subsequent to his entry which related back to the first application. The decision of the Supreme Court of Wisconsin is, that the allegations of the complaint in this regard were not proved. We believe this conclusion is erroneous and the trial court was right.

The evidence given by Mr. Jacobus on the contest, the opinion of the Commissioner of April 29th, 1892, the opinion of the Register and Receiver of August 9th, 1894, show Mr. Jacobus' settlement and application as alleged in the complaint and his homestead affidavit of July 6th, 1892 (Rec. 60) states that it is made in lieu of the application and affidavit dated February 23rd, 1891, for the same land. The fact that a new paper was filed in lieu of the previous application which was rejected and which was insisted upon by reason of the contest immediately filed, does not, in our judgment, have the effect of delaying the application under the rule that we have already invoked, that where an applicant for public lands has done all that the law requires of him to obtain public lands, he loses no right by reason of any adverse action of the land department officials.

See, in addition to cases already cited,

Ard. vs. Brandon, 156 U. S., 537.
Mass. vs. Dowman, 176 U. S., 413.

In conclusion we submit that the only federal question

for review in this court is, whether the officers of the Land Department held as a fact that Mr. Jacobus' entry and commutation proofs were fraudulent and that in so far as this is a question of fact, the findings of the state courts will not be reviewed. We submit further that the true construction of the opinions of the officers of the Land Department, including that of the Honorable Secretary of the Interior is, that they found no fraud or lack of good faith upon the part of Jacobus, except with reference to his supplemental proof, influenced by the erroneous call for such proofs, and the circumstance that Mr. Jacobus had conveyed the land, which in no way affected his right to the land under the Act of June 3rd, 1896. We submit further, that Mr. Hill is estopped from asserting any fraud or improper conduct on the part of Mr. Jacobus, prior to December 27th, 1892; that the determination of the state courts upon that question is final, and that there is no error in the record.

Dated October, 1904.

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